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**Competition and Cooperation between International Courts:  
A Critical Approach to the New Paradigms of Cross-Border Dispute Resolution Model**

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**Abstract:** This article examines the arising cross-border dispute resolution models (Cooperation and Competition among national Courts) from a critical perspective. Although they have been conceived to surpass the ordinary solution of a Modern paradigm (exclusive jurisdiction, choice of court, *lis pendens*, *forum non conveniens*, among others), they are insufficient to deal with problems raised with present globalization, as they do not abandon aspects of that paradigm, namely, (i) state-based Law; and (ii) standardization of cultural issues.

**Keywords:** Competition among Courts; Cooperation among Courts; Modern International Law; Post-Modern International Law

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## 1 Introduction

As the world grows smaller, as cross-border circulation of persons, goods and services increases, the number of disputes which have an element of internationality is growing. At the same time, rules on international jurisdiction have not really evolved. [...]. The result is that each country has its own provisions on jurisdiction. [...] However, all these mechanisms are used unilaterally by judges. Therefore there is no guarantee that a foreign court that has jurisdiction under its own rules would indeed be happy to follow what another country's court decides. (KESSEDJIAN, 2008, p. 327)

The object of this essay is to develop a brief dissertation on the topic of competition and cooperation among Courts.

Due to different regimes of conflict of laws, within international disputes arising from conflicts related to cross-border activities, it is possible to emerge the situation in which several Courts (Tribunals, Arbitrations, etc.) can be considered to have jurisdiction – most of the times, a sovereign jurisdiction – in order to solve the case.

An ordinary solution to this equal possibility of submitting a case to be settled by different Courts is to resort to traditional conflict of laws mechanisms, such as jurisdiction, exclusive jurisdiction, choice of court, *lis pendens*, *forum non conveniens*, among others. But, in spite of their effectiveness to resolve commonplace issues in Private International Law, it has to be acknowledged that, nowadays, these solutions do not work properly, seeming insufficient to deal with problems raised with present consolidating globalization.

This insufficiency diagnosed can be inserted in a specific comprehension of a paradigmatic exhaustion, related to sovereignty: Jurisdiction is seen as a matter of sovereignty and, traditionally, one state (or one state's Court) cannot accept an order given by another state (or state's Court), due to an interesting and incompatible clash of sources of Power. Jurisdiction, traditionally, is a non-negotiable question.

Grounded – literally – in the sovereign concept, this orthodox notion of Jurisdiction, in present days, faces several problems with which, in its dogmatically terms, it cannot resolve. International litigation, in this sense, in order to operate synchronically with the complexities inserted by this globalized world, has developed new conceptions of manners whereby this notion of Jurisdiction could be improved, aiming, in the end, to a foreseeable and certain procedure to solve cross-border disputes.

These models are, mainly, competition and cooperation among Courts, two different ways to deal with an old concept based on sovereignty inserted in a more complex and uncertain world order.

While the former advocates the idea that a free market of judicial services between Courts of different countries would enhance, improve and hasten the solution of cross-border disputes, the latter pretends to be simply a technique whereby Courts of different countries can work together, by direct communication, in order to solve a cross-border dispute. The competition of Courts will be the first paradigm which will be examined by this paper, followed, then, by more detailed information on the cooperation paradigm. Cooperation is seen, as it will be noted, as the preferred one to guide the construction of a new baseline to Jurisdiction in cross-border controversies, although it must not be regarded as immune to criticism.

This paper is structured in two main parts.

The first part examines recent literature regarding both models, in order to understand the precise terms of the discussion implied in each one, whereby the refusal of competition paradigm will be explained and justified by the cooperation paradigm. The second part aims to develop some critical remarks mainly on the latter model, the preferred one, as this new baseline to Jurisdiction in cross-border controversies seems to be, in a Post-Modern International Law condition, more than a mere and neutral technique.

It is expected that the authors can achieve the final purpose of this paper, which is to try to outline possible original contributions to contemporary international legal thought on the development of improved mechanisms to deal with cross-border disputes arisen in a Post-Modern, complex and globalized world disorder.

## **2 Thinking Conceptually: Competition and Cooperation Models**

### *2.1 Competition*

Competition paradigm can be justified by an economic analysis of law perspective (DAMMANN; HANSMANN, 2008), although one cannot say that competition among Courts or between legal systems is a result of law and economics (L&E) school of thought, mainly due to two major reasons.

First of all, L&E is a theoretical construction which gives legal thought only an instrumental framework of analysis (FISS, 1986, p. 14) which can be used to justify either one or another model of cross-border dispute resolution paradigm. As it is an 'instrument par excellence' (SALAMA, 2008, p.

9), one can argue for competition among Courts (DAMMANN; HANSMANN, 2008) as favorably as for cooperation among Courts (SPIGELMAN, 2008). This ‘infidelity’ or ‘insincerity’ of L&E, due to its ontological nature of being an instrument for justifying economically one or other perspective, assures that neither competition among Courts, nor cooperation among them, is caused, directly, as an exact result, by L&E school of thought.

Nevertheless, there is, actually, another strong reason to not understand that competition among Courts or between legal systems is a result of L&E school of thought, namely, that economic analysis of law, when proposing competition among Courts, is only describing a previous condition which was not created by this legal thought.

In fact, L&E can be seen only as giving an analytical framework, with the economic variant, whereby a previous phenomenon of competition (primitive aggression and hatred) (ADORNO, 2006, p. 155), which competition between Courts is only a particular and concrete manifestation in present International Law’s History, can be conceptually and systematically explained by this specific theoretical thought. It consists, precisely, in perpetuation of an inner cultural disposition of overcoming and beating the Other (mankind), in the same way Nature must be overcome and beaten, which is related to an instrumental perspective of reason (CHIARELLO, 2001; HORKHEIMER, s.d., p. 13-64).

This is a typical *anima* disposition constructed inside the historical development of Western society, since greek aurora (ADORNO; HORKHEIMER, 2006), according to which Nature, mankind, and everything in the environment must be subjugated, domesticated, tamed, controlled and exploited (FROMM, 1987, p. 43 and 87; HABERMAS, 2006a), in order to allow the rise of one who stands out over the others, hegemonically, dividing society into dominant and dominated (HONNETH, 1996, p. 508-11, 1997a, 1997b). This is the basis of the competition principle, which is the utmost expression of the attempt to maintain this barbarian logic of rising, detaching and submitting (ADORNO, 2006, p. 161-3).

Howsoever, understanding L&E analysis of competition paradigm, which specifically proposes an international market of Courts according to its economic variant, it is important to precise some main concepts of L&E thought, as this perspective is not only substantially linked to *mainstream* economic analysis of law premises, but also structurally.

In fact, L&E is a school of thought which, in general, aims to develop a complete research on the economic effects of juridical norms, in order to assess the impact which Law produces upon free market’s efficiency result of optimal allocation of resources, whereby goods and services remain with

those who value them most, in an economic pattern of evaluation (COOTER; ULEN, 2004, p. 88 and 99; FISS, 1986, 2-4 and 6; POSNER, 1990, p. 353, 2003, p. 3-4 and 9-10; SALAMA, 2008, p. 16-7).

Not only this perception determines that inefficient economic agents shall be eliminated according to the free market competition logic, because only those who contribute to an optimal allocation of resources should remain, but it also imposes that the accepted juridical norms are only those who improve market's efficiency: this is a point where there is no need for regulation, due to market's auto regulation capacity (ARIDA, 2005, p. 14-5; COOTER; ULEN, 2004, p. 87; EDLIN, 2000, p. 407-8; FISS, 1986, p. 2-7; GUZMAN, 2000; HANSON; HART, 1996, p. 311-2, 314-5 and 330; KENNEDY, 1998, p. 469; POSNER, 1990, p. 360-1; SALAMA, 2008, p. 5-6).

But L&E main authors also know that, although market has the auto regulation capacity, which disregards the need of some juridical norms, it can have a fail performance in its objective of optimal allocation of resources. This state of non-efficient affairs is mainly the result of the conjunction of two factors that are always present in market's natural running, namely, (i) a structural factor, also known as market failures; and (ii) a dynamic factor, transaction costs. Both of them must be eliminated or, at least, must have their effects reduced, in order to allow a truly efficient market. (ARIDA, 2005, p. 14; KENNEDY, 1998, p. 469 and 472).

Market failures are structural deficiencies which hinder an actual free market dynamic; they are potentially found in every structure which is aimed to operate in way similar to a market, as they derive from the inherent logic of function which is assumed for markets.

There are mainly four kinds of market's failures: (i) information asymmetry, whereby economic agents do not have sufficient information in order to make the better choice; (ii) public goods, or, in other words, goods or services that are left at free disposal to anyone, anytime, as it is not particularly owned by a single person – the trend is to waste good's or service's properties -; (iii) positive or negative externalities, which are positive or negative outcomes of the market which are not inserted or considered in pricing system as, respectively, incomes or costs; and (iv) concentration of economic power, whereby an agent can determine in pricing system in your own benefit (MANKIWI, 2008, p. 11-2, 154, 203-9 and 223-34; PINHEIRO; SADDI, 2005, p. 256-63).

Transactions costs are all the costs of exchange, or, in other words, costs in which each party incurs in order to practice a transaction, working, here, in other words, as a barrier which may deter or refrain possible transaction between economic agents (COOTER; ULEN, 2004, p. 91-4).

Knowing these main premises of economic analysis of law, it is possible to note that the justification of competition among Courts which is grounded in L&E school of thought is not only substantially bound by these assumptions, as it defends (i) free market of Courts, as a judicial service; (ii) improvement of judicial systems, both in origin or host state, due to competition logic (specialization and amelioration); (iii) improvement of contracting environment as a consequence of more effective contract enforcement; (iv) specialization of Courts, in order to centralize the dispute resolution of certain themes in specific Courts (for instance, Delaware's Chancery Court would be responsible for cases involving publicly traded corporations, whereas New York should settle disputes on commercial contracts matters); and (v) optimal allocation of resources and economic development derived from the access to these better Courts (DAMMANN; HANSMANN, 2008, p. 10-15 and 19).

Actually, there is a structural compromise with L&E school of thought, as the analysis seeks market failures and possible transaction costs which may arise, aiming to propose alternative paths to overcome them, in order to set up a real and efficient free international market system of Courts regarded as a source of judicial services in contract litigation (DAMMANN; HANSMANN, 2008).

In fact, the main idea is to allow 'litigants from countries with ineffective judicial systems to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems' (DAMMANN; HANSMANN, 2008, p. 3), as an extraterritorial paradigm of judicial dispute resolution would help economic development of transition economies, due to the fact that this logic for settling disputes would eliminate burdens upon litigants and nations as a whole (DAMMANN; HANSMANN, 2008, p. 3).

if governments give commercial litigants alternatives to their domestic courts, those alternatives should include access to the public courts of other states. This will require that at least some states with strong courts accept broad jurisdiction over purely domestic commercial disputes from other states, and that the latter states recognize this jurisdiction and expeditiously enforce the resulting judgments – all of which will require international legal reforms. (DAMMANN; HANSMANN, 2008, p. 4).

The main market failures of this propose of a global market for judicial services contract litigation which were found are (DAMMANN; HANSMANN, 2008, p. 15-28):

(i) *informational asymmetries*: parties might choose a Court that is less beneficial to them: competitive Courts and lawyers could take advantage of uninformed parties, implying a suboptimal allocation of resources and a less efficient dispute resolution;



(ii) *negative externalities*: such as (a) less refinement of origin state's law and judges, because the law will not improve by precedents and judges will not hone their skills over certain matters (less refined legal system and low judicial expertise); (b) weakening voice by exit, which means, a decrease on potential political pressure by litigants in origin states for the improvement of their local judicial services; and (c) burdening witnesses, because inherent costs of witnesses to participate in a trial, like waste of time, of money and of self-effort, will certainly grow with global access to judicial services; and

(iii) *concentration of Power*: also known as sovereignty, dignity and protectionism arguments, this species of market of judicial services failure diagnoses that there might be a control of extraterritorial litigation by states, because they do not want to lose some of its ability to govern its citizen's affairs, as this would imply, also, the loss of local power and status.

The main transaction costs to this propose of a global market for judicial services contract litigation which were found are seen as practical obstacles (barriers) to its development, as they derive from the running dynamics of a market system (DAMMANN; HANSMANN, 2008, p. 28-31 and 39-56), namely, (i) distance; (ii) language; (iii) different legal and commercial cultures; (iv) availability of legal counsel; (v) possibility to select the forum in which potential litigants and litigants wish to resolve their disputes; (vi) certainty upon the conviction that the resulting judgment will be recognized and enforced in their home state; and (vii) increasing the demand for extraterritorial litigation by creating the right incentives.

## 2.2 Cooperation

Defining cooperation proves itself as a difficult task once one considers that its concept is very often presented under different names. Nevertheless, synonyms introduce the very same idea of a system in which 'two (or more) judges who are (or may be) seized of the same matter (or related matters) [...] speak together and decide with one voice what is the best way to deal with the case' (KESSEDJIAN, 2008, p. 327).

In fact, the presented definition refers to the idea of *direct cooperation* between judges across borders. However, the term ‘cooperation’ is used many times to refer to a broader range of means of communication between judicial authorities. In those cases, one needs to establish a clear distinction between cooperation and assistance, when those terms are not synonyms.

Kessedjian (2005) adverts that ‘the use of the word “cooperation” is important. Thirty years ago, one talked about “judicial assistance”. The word “assistance” is still used, but is really needed is true judicial cooperation’. Assistance could be defined as the ‘performance of a judicial act by one court on its territory upon the request and for the benefit of another’ (RISTAU, 1984, *apud* KESSEDJIAN, 2005).

Whenever one refers to direct cooperation, it is necessary to remind that direct cooperation can only occur under the exercise of a Court’s jurisdiction, which, generally, requires express statutory provision (SPIGELMAN, 2008, p. 6).

Recognizing that sort of legal barrier, the Hague Conference on Private International Law established on its Conclusions and Recommendations to Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (Recommendation n. 15) that ‘where there is concern in any state as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the necessary steps should be taken to ensure that such legal basis exists.’

The American Law Institute goes in the same direction when it establishes in its Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases for NAFTA’s countries (Guideline n. 1) that

[e]xcept in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied.

Many mechanisms have been developed in order to address direct communication between judges across borders. One can count among them examples such as the formation of networks of government authorities and judges, or mechanisms of cooperation between state judges and arbitral processes. Court-to-court cooperation mechanisms, specially with regards to the granting of provisional

measures, the taking of evidence, and related to bankruptcy proceedings are also examples of means to address direct cooperation.

Cooperation among Courts paradigm is seen as the preferred one to guide the construction of a new baseline to Jurisdiction in cross-border controversies if compared with the competition one, basically for two principal reasons, namely, that this paradigm (i) develops mechanisms aimed to privilege, to preserve and to enhance different countries' diversity and culture; and (ii) increases the efficiency of cross-border activities. The next two topics will examine each one.

### 2.2.1 Uniformity versus Diversity

Kessedjian (2008) identifies a new way of thinking, by which societies tend the more and more to define themselves by economic parameters and 'economic efficiency' has become an obsession in all areas of human activity. It is identified that this tendency relates to a larger movement expressed in the L&E school of thought. For them, transaction costs express inefficiency and, therefore, must be reduced. In fact, their reduction would be the ultimate goal of any legislation.

In order to reduce transaction costs, uniformity is promoted by transplants from western countries or by international legal harmonization processes. On those grounds, regional economic integration schemes exemplify the tendency, since they end up promoting legal harmonization in their effort to diminish barriers in order to boost commerce.

On the other hand, while increased efforts towards uniformity are promoted, our times have experienced a never-before-seen effort towards diversity. For Kessedjian (2008), this controversy characterizes a new period in history, the 'post-modern' period.

In the legal field, it seems that the opposed force towards diversity appears when it is given priority to a national sovereignty perspective over the underlying commercial substance of a dispute (SPIGELMAN 2008). Courts are many times regarded as a manifestation of the state.

Both Spigelman (2008) and Kessedjian (2008) end up advocating for cooperation among courts, but the reasons for each one to do so are deeply distinct. Spigelman (2008, p. 6) faces cooperation as an improved way to promote minimization of transaction costs. For him, such cooperation can only occur under a court's jurisdiction, which requires express statutory provision for most of the cases. Kessedjian, on the contrary, believes cooperation as a mechanism to foster diversity, which is a 'much better value as it allows for tolerance between people, societies and cultures'.

Cooperation means direct communication for Kessedjian, and it promotes diversity because of the different procedural rules that will come together at the same time as judges talk one to the other, helping to solve a dispute in a much more respectful way.

On those grounds, it seems to us that Kessedjian does not leave room for the idea that Courts are seen as embodied sovereignty organs. Sovereignty concerns are not to be addressed then, since direct communication would take all involved jurisdictions' provisions into consideration. Diversity would only be reaffirmed under those mechanisms.

Further on, Kessedjian (2005) identifies that disputes have been changing in character, as the increased movement of people, entities and activities has been promoted and provoked by globalization. One very clear example of that is the greater role played by private actors through party autonomy in the creation of legal norms followed by the increasing diminished role played by nation-states on that activity. Another clear demonstration of those changes is the increasing demand for justice while resources given to judiciary systems in most countries did not follow that augmentation. As a consequence- and another expression of the change in the character of disputes- states rely the more and more on alternative ways for the settlement of disputes, which represents a 'privatization of justice', for Kessedjian (2005). Arbitration has becoming more aggressive and procedural codes for transnational disputes emerge, making it clear that traditional conflict of laws techniques might still work, but they certainly do not function the way we need them to nowadays.

Therefore, Kessedjian concludes the assistance solution that used to work thirty years ago needs is now inadequate to deal with the new characteristics of disputes, which only clearly defines the need for effective cross-border judicial cooperation instead of old-fashioned judicial assistance.

In other words, diversity allows respect for multiple ways of conceiving and applying law in a world where uniformity is assumed to be something to be promoted for itself, since it is understood as being an instrument for the reduction of transaction costs, which are an expression of the tendency of defining everything simply by its economic measure. For the author, uniformity is not a universal value and should not be considered as an overall goal in international norm creation.

As we understood it, Kessedjian calls for diversity, not only because it respects much better human values but also because it answers the urges that arise with the new kind of disputes produced by globalization.

### 2.2.2. Efficiency of Cross-Border Activities

Cooperation among Courts is also seen as an important paradigm as it ensures the parties that the solution which will be designed by a joint body of deciders originated from different countries will avoid ‘wasteful litigation, unnecessary expense and excessive delay.’ (SPIGELMAN, 2008, p. 1).

In fact, to adopt Cooperation model is to minimize risks and transactions costs that prevent the development of efficient international transactions, as it aims to deal with (i) uncertainty about the ability to enforce legal rights; (ii) additional layers of complexity; (iii) additional costs of enforcement; (iv) risks arising from unfamiliar foreign legal process; (v) risks arising from unknown and unpredictable legal exposure; (vi) risks arising from lower levels of professional competence, including judicial competence; and (vii) risks arising from inefficiencies in administration of Justice – in some cases, of corruption (SPIGELMAN, 2008, p. 2-4).

Perhaps most significantly, the fear of the unknown inhibits creditors when dealing with multinational corporations in the absence of a significant level of assurance that the difficulties of cross-border enforcement in insolvency will not impede the collection of debts. (SPIGELMAN, 2008, p. 4).

This means that there are risks which support the inhibition of international activities, as, for example, international investors does not know for sure if their credits would be recovered in an insolvency hypothesis when a cross-border dispute arises. The lack of knowledge and of certainty does not allow a real and full development of important transborder business as promised by globalization.

These risks are justified based on uncertainty, or, in other words, because international actors presuppose that, in these cases, Courts will overlook, or even disregard, substantial matters, as they will stress accentuate national sovereignty, as Jurisdiction always involves the question of political Power from a state over disputes emerged inside its on territory. Dispute resolution is taken as granted as a matter of state.

When the official courts are engaged, as they traditionally are when insolvency intervenes, then the underlying commercial substance of the disputes that need to be resolved is often overlooked. A perspective of national sovereignty is given priority, because the courts are regarded as a manifestation of the state. (SPIGELMAN, 2008, p. 6).

According to this conception, cooperation between Courts is necessary because it helps improving and increasing cross-border activities, exactly because it eliminates all transaction costs

related to risks immunization or to parallel proceeding in Courts located in different countries. This reduction of uncertainty allows a more efficient economic performance of the system.

That is why, for instance, usually, cooperation among Courts are constructed in order to create, by judicial assistance, an 'air of trust' around (i) civil proceedings, generally (freezing or determining claims); (ii) insolvency proceedings, specifically; (iii) preservation or realization of assets; and (iv) obtaining evidence or information about voidable and fraudulent transactions (SPIGELMAN, 2008, p. 7).

### 2.2.3 Forms of Cooperation: Civil Law and Common Law

There are two main forms of establishing Cooperation among Courts model, namely, the civil law paradigm and the common law paradigm. It is important to note that the difference between common law and civil law legal systems is an important formal variant which determines the possible performance of an adopted form of cooperation among Courts: attempts pursuing a civil law model logic always require express statutory provision, which is not the case for common law model, as it allows the develop of judicial cooperation in the absence of express statutory provision, through a judge-made law logic (SPIGELMAN, 2008, p. 6-7).

This difference between performance of the models adopted to introduce judicial cooperation logic in international resolution of cross-border litigation derives from the fact that, in civil law, it is required a Model Law accepted by each country, whereas this condition is not required for a judicial cooperation which adopts a common law common approach. Usually, national interests and sovereignty are pointed as issues which are not compatible with a cooperation method expressly agreed, a condition clearly not favorable to the success of an uniform cooperation structured according to civil law form.

[T]he UNCITRAL Model Law on Cross-Border Insolvency has been the principal global initiative for establishing judicial co-operation. However, in the Asia Pacific region the Model Law has, as I understand it, only been adopted by the United states, Australia, New Zealand, Korea, Japan and is enacted, but not proclaimed in Canada. It is under consideration in India. The lack of success in this region reflects the reluctance many Asian nations have manifested with respect to other provisions for co-operation in civil and commercial litigation, e.g. the Hague Conventions. (SPIGELMAN, 2008, p. 8).

Actually, a form of cooperation which is more effective than the last one can be found when the method adopted follows the more flexible logic of common law, in a scheme that permits, but do not

mandate, cooperation without disregarding the importance of locally determined statutes (at the regional or bilateral level).

It seems that, for those who want to stand in a civil law paradigm, a statutory arrangement spatially limited to regional or bilateral provision that authorizes cooperation, added to a flexible common law logic, can be a more efficient method to construct a judicial cooperation mechanism, as it does not depend on the universal acceptance of the states (SPIGELMAN, 2008, p. 9-18).

In a common law model, judicial cooperation can be less rigid, as it does not depend on an express authorization given by a statute. Cooperation can be created according to a logic of judge-made law, which is open, as a structural condition to any common law system, to a pragmatic development of practices which modifies universalism. This possibility is based on the principle of inherent jurisdiction, according to which a Court has to provide assistance to foreign courts, a legal dynamic unaccepted by civil law logic (SPIGELMAN, 2008, p. 19-20). A statute authorizing or imposing cooperation is not needed to common law model because the distinction between legislative and judiciary is not that clear, and not at all expected, as judge's authority does not derive from a legislative act:

common law judicial mindset means that co-operation with judges in other states appears natural. The dichotomy between legislative and judicial authority is not as strict. Accordingly, the emergence of co-operation between courts is not inhibited by a concern that the court's jurisdiction or competence is being exceeded. There are now numerous examples of such judicial co-operation in the absence of express statutory authority. (SPIGELMAN, 2008, p. 21).

This principiological authorization given by common law system is flexible enough to allow spontaneous and functionally cooperation acts between judges from different countries. This direct judicial communication seeking to grant assistance to another state court, in some cases without the need to resort to a non-judicial organ of each state as an intermediary, enables a decentralization from a strict own-state perspective, as it inhibits considerations upon national sovereignty and saves time and costs for every party (SPIGELMAN, 2008, p. 21-8).

#### (a) Civil Law Examples

The ordinary manifestation of a method of cooperation among Courts is under the form of civil law legal system, or, in other words, under the perspective of the need of a statute regulating, abstractly, the terms of the cooperation, a way, as was stressed some items above, which is not usually successful, as it depends on the approval of several countries inserted in different legal cultures and traditions.

These attempts to regulate in a general perspective issues concerning cooperation between courts are found in normative (rules) and in pre-normative (soft law) international instruments, in three different baselines of regulation, namely, International Level, Regional Level and National Level.

Only a few examples of regulation attempts on each of those levels will be briefly examined. The samples chosen are not exhaustive, as only some of the regimes which were found during the research are going to be mentioned, according to their potential representativeness in terms of (i) territory; (ii) international economy projection; (iii) cultures; or (iv) epistemic community.

At the International Level, it is important to mention mainly (i) the activities of the Hague Conference on Private International Law (HCPIIL) (drafts and Conventions); (ii) the joint work between the HCPIIL and European Union (EU) on family law; and (iii) a soft law regulation given by a Resolution prepared by the International Law Association (ILA).

The Draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, at least in its final version of the discussion held in Commission I of the First Part of the Diplomatic Conference 6-20 June 2001, has not any single provision on judicial cooperation among Courts. Although it aims uniform rules between contracting parties on Private International Law issues, it does not mean that it contains innovative devices of cooperation like the ones described by C. Kessedjian (2005).

However, despite of this lack of concern to attempt to draft a regulation on judicial cooperation, Hague Conference on Private International Law has adopted several Conventions on Judicial Cooperation, mainly, but not exclusively, on family law issues, such as protection of children or adults: (i) Hague Convention n. 2, on Civil Procedure, of 1 March 1954; (ii) n. 13, on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, of 15 November 1965; (iii) n.14, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, of 15 November 1965; (iv) n. 20, on the Taking of Evidence Abroad in Civil or Commercial Matters, of 18 March 1970; (v) n. 28, on the Civil Aspects of International Child Abduction, of 20 October 1980; (vi) n. 33, on Protection of Children and Co-Operation in Respect of Intercountry Adoption, of 29 May 1993; (vii) n. 34, on Jurisdiction Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for Protection of Children, of 19 October 1996; (viii) n. 35, on the International Protection of Adults, of 13 January 2000; and (ix) n. 37, on Choice of Court Agreements, of 30 June 2005.



Nonetheless, it must be stressed that the form whereby judicial cooperation is regulated by each of these conventions varies from Convention to Convention, which means that (i) for each Convention, there is a more or a less detailed provision on judicial cooperation, most of the times summarized in general and abstract propositions; and (ii) none of these uniform regulation patterns embodies the logic of innovative judicial cooperation as described by C. Kessedjian (2005), as it provides the necessity of a central authority. This form of co-operation among Courts is constructed by uniform rules, which differs from the others, as it does not provides direct communication between courts or by an innovative mechanism of co-operation, as described by C. Kessedjian (2005). It seems that it is restricted to an uniform regulation model.

The joint work between the HCPIL and EU on family law cannot, also, be forgotten, although it is only a draft of guidelines. The outcome of the meeting in Brussels on 15-16 January 2009 is called Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks. This particular document is interesting, as it aims to foster innovative judicial co-operation measures, just as the ones described by C. Kessedjian (2005), as it institutes the International Hague Network of Judges.

The main idea of this document is to develop international, regional and national judicial networks, as it values direct judicial communications in international child protection cases. These different networks should operate in a complementary and coordinated manner, in order to achieve synergies, and should, as far as possible, observe the same safeguards in relation to direct judicial communications.

It must be mentioned a soft law regulation given by a ILA Resolution of 17-21 August 2008, in Rio de Janeiro, Brazil, namely, Resolution n. 1/2008, Paris-Rio Guidelines of Best Practices for Transnational Group Actions, which provides specific guidelines for transnational judicial cooperation related to group actions. This document is also interesting because it aims to foster innovative judicial co-operation measures just as the ones described by C. Kessedjian (2005), as it institutes direct means of communication between Courts in order to deal efficiently with group actions, even if not authorized by a state law. Judicial communication is not mediated by a central authority in the hypothesis of the document, which seems to be an advance.

At the Regional Level, it must not be forgotten, for instance, (i) American Law Institute's Guidelines on Court-to-Court Communication in Insolvency, which should be applied, initially, only by

member-countries of the North American Free Trade Agreement (NAFTA) (United States of America, Canada and Mexico); (ii) EU's Council Regulation n. 44/2001, OJ 2001 L 012; and (iii) MERCOSUR.

American Law Institute (ALI), 16 May 2000, has adopted some Principles of Cooperation among NAFTA Countries in Transnational Insolvency Matters, also known as Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, which tries to enhance coordination and harmonization of insolvency proceedings that involve more than one country through transparent communications procedures among the jurisdictions involved, in order to allow rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

Direct communication between the courts of the countries involved in insolvency and reorganization proceedings is important because it will assure the maximum available benefits for the stakeholders of financially troubled enterprises.

This example of Guidelines for judicial cooperation is interesting because it allows a direct communication between the authorities of different jurisdiction related to insolvency, such as judges, insolvency administrators or authorized representatives of Courts, in order to coordinate and harmonize proceedings between them (Guidelines 2 and 3). It is also important to stress that this Guidelines also provides the possibility of using different means of communication between Courts, including telephone or video conference call and other electronic means (Guideline 6). There is, also, a provision on conjunct hearing between Courts, which demands precise actions in order to give both Courts the same information before the hearing (Guideline 9).

An important aspect of these Guidelines is that they are not intended to be static, or else, immutable, because they can be adapted and modified in order to fit the circumstances of individual cases, changing and evolving according to the amelioration of international community experience in working with them. Its intention is to be applied in a way that it is consistent with local procedures and local ethical requirements. As they embody innovative measures of direct communication between judges, without the need of a central authority, they can be seen as an example of judicial cooperation similar to those described by Kessedjian (2005).

European Union Council's Regulation n. 44/2001, OJ 2001 L 012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters does not have a single provision on judicial cooperation among Courts as the ones described by C. Kessedjian (2005). It has, in fact, only general provisions related to judicial cooperation, most of the times stressing the need for uniform procedures, in the preamble, as follows:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. *In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.*

(2) *Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member states bound by this Regulation are essential. [...].*

(15) *In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member states. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously (emphasis added).*

Mercado Comum do Sul (MERCOSUR) is an international organization created to promote the economic integration of its member states<sup>1</sup>. Despite its core economic intention, MERCOSUR has legal provisions<sup>2</sup> for judicial cooperation between its members.

The following box shows the treaties that celebrate judicial cooperation among MERCOSUR members<sup>3</sup> and that came already into force.

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<sup>1</sup> MERCOSUR was created by Assuncion Treaty in 1991, but only acquired legal personality in 1994 Ouro Preto Protocol. Nowadays, organization members are Argentina, Brazil Paraguay and Uruguay. Venezuela is a candidate to MERCOSUR, but its entrance is lacking the approval of Paraguay's Congress. MERCOSUR official website: <<http://www.mercosur.int/msweb/Portal%20Intermediario/>>. Very helpful literature for a brief acknowledgement on the subject in Fench can be found at DESSE, René; DUPUY, Hector. Mercosur: vers la "grande Amérique latine"? Paris: Ellipses, 2008.

<sup>2</sup> It is relevant to mention that MERCOSUR does not function under supranationality. Therefore, all MERCOSUR decisions are intergovernmental and, being such, they need due internalization in order to be enforceable in national courts. For a complete list of agreements in force or not into force, please refer to <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm>>.

<sup>3</sup> The box was prepared by the authors based on the information provided by MERCOSUR website, available at <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/mercosurprincipal.htm>>. Last visited: June 15<sup>th</sup>, 2010

Website	Treaty Name	Central Authority provision
<a href="http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/1992/Portugués/3.%20Protocolo%20de%20las%20Leñas.pdf">http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/1992/Portugués/3.%20Protocolo%20de%20las%20Leñas.pdf</a>	Protocolo de Las Leñas para Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativo (Protocolo de las Leñas). Signed in: Valle de las Leñas Date: June, 27th, 1992	art. 2
<a href="http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/1996/portugues/17%20Protocolo%20de%20Asistencia%20Juridica%20Mutua%20en%20Asuntos%20Penales.pdf">http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/1996/portugues/17%20Protocolo%20de%20Asistencia%20Juridica%20Mutua%20en%20Asuntos%20Penales.pdf</a>	Protocolo de San Luis de Asistencia Jurídica Mutua en Asuntos Penales. Signed in: San Luis Date: June, 25th, 1996	art. 3
<a href="http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/2002/portugués/53.%20Acuerdo%20de%20Cooperación%20y%20Asistencia%20Jurisdiccional%20MERCOSUR,%20Bolivia%20y%20Chile.pdf">http://www.mre.gov.py/dependencias/tratados/mecosur/registro%20mercosur/Acuerdos/2002/portugués/53.%20Acuerdo%20de%20Cooperación%20y%20Asistencia%20Jurisdiccional%20MERCOSUR,%20Bolivia%20y%20Chile.pdf</a>	Acuerdo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa entre los Estados Parte del MERCOSUR, la República de Bolivia y la República de Chile. Signed in: Buenos Aires Date: July, 5th, 2002	art. 3

It is interesting to point out the vast range of subjects ruled by the treaties, from criminal to work matters, which would point out an advance in judicial cooperation, due to its wide champ of application. But, at the same time, all instruments already in force bring statutory provision for the establishment of central authorities in order to ensure cooperation in judicial matters. So, even though they tend to amplify cooperation, they do not change the quality of traditional assistance.

Even though MERCOSUR members have been agreeing on traditional assistance rules to pace their judicial cooperation, they realized it was very important to define rules regarding jurisdiction over

contracts if they were to advance on economic integration, and they decided to celebrate Protocolo de Buenos Aires on International Jurisdiction for Contract Matters (Buenos Aires Protocol)<sup>4</sup>.

The preamble of Buenos Aires Protocol stands very clearly that the treaty aims to foster juridical certainty and, as a result, to promote economic relations among private sector of the member states. All that looks forward to strengthening of the economic integration process.

The champ of application of the Protocol is defined in Article 1 as being that of a litigation related to international contracts on civil or commercial matters.

International contracts are defined as being those signed between persons or companies domiciled or having legal domicile in different states that signed the Asuncion Treaty, or, on the one side, a person or company that fulfills those requirements and, on the other side, a person or a company from a state non-part to the treaty but who have agreed on that choice of jurisdiction, when there is a 'reasonable connection', according to the terms of the Protocol, to that jurisdiction.

It is also interesting to point out that the Protocol expressly allows parties to choose the jurisdiction of an arbitral tribunal. That provision goes along with the general lines of MERCOSUR, where arbitration is the mechanism chosen by the organization to set disputes under its treaties<sup>5</sup>.

Bankruptcy, family law, labor law, administrative contracts, consumer law, transportation contracts, insurance contracts and property rights are expressly excluded from the champ of application of the Protocol by article 2.

It can be seen as unnecessary the prevision of article 4 on the obligation of respect to the choice of jurisdiction, but the article mentions written form and the obligation that choice cannot have been obtained abusively.

It is quite interesting to observe that the Protocol has previsions on articles 7 to 12 over subsidiary jurisdiction, since they may serve as legal criteria for the resolution of conflict of competence regarding two member state courts.

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<sup>4</sup> Buenos Aires Protocolo ("Protocolo de Buenos Aires sobre Jurisdicción Internacional en Materia Contractual") was signed in August 5th, 1994 and came into force in 2004, after the internalization in all member states. It is available at <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/Acuerdos/1994/portugués/7.%20Protocolo%20de%20Buenos%20Aires.pdf>>.

<sup>5</sup> In a very brief definition, one could say that MERCOSUR Dispute Settlement mechanism is based on international arbitration, as Brasilia Protocol for the Settlement of Controversies (available at: <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/Acuerdos/1991/portugués/2.Protocolo%20de%20Brasilia.pdf>>) first ruled and, nowadays, as its successor, the Olivos Protocol for the Settlement of Controversies (available at: <<http://www.mre.gov.py/dependencias/tratados/mercosur/registro%20mercosur/Acuerdos/2002/portugués/51.%20Protocolo%20de%20Olivos.pdf>>) dictates.

A general provision on how to define the domicile of a party is provided on article 9, while article 9.2 clarifies how to define the domicile of a legal person that has branches, subsidiaries agencies and representations in multiple jurisdictions and it bases definition on what kind of activity is exercised in each place. But it does not help much to solve jurisdiction competence conflicts between courts when the Protocol admits on article 12 that, if there are many defendants, then the competent court will be any of the courts in which any of the defendants are domiciled.

At the National Level, it is interesting to examine the example of Brazilian legal system. The existing forms of cooperation include the creation of networks (of government authorities or of judges), the judicial cooperation in arbitration and the direct communication between state judges (even if they are only allowed to do so in certain specific areas).

(i) *networks*: according to the official website of the Brazilian Ministry of Justice<sup>6</sup>, Brazil takes part in different cooperation mechanisms, but it has very definite patterns when it takes part in those mechanisms. Brazil understands that international juridical cooperation networks have the objective of facilitate and accelerate cooperation among their member states, as well as provide juridical information and clarify Brazilian legal practices to other countries. On the other hand, networks are understood by the Brazilian government as means to help Brazilian authorities when they need to ask for international cooperation.

Brazil makes it clear that cooperation happens through ‘contact points’, meaning that certain people are appointed to take care of the development of cooperation mechanisms in national level. It is left quite clear that cooperation and responsible authorities do not have bureaucratic characteristics, which means that they are informal. Brazil is currently part to three different cooperation networks: IberRede, Rede Judiciária da CPLP and OAS.

A Rede Iberoamericana de Cooperação Jurídica Internacional (IberRede), in Portuguese, or ‘Ibero American Network of International Judiciary Cooperation’<sup>7</sup> is a structure formed by contact

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<sup>6</sup> Brazilian Ministry of Justice Official website is available on the internet as <<http://portal.mj.gov.br>>. The whole website is in Portuguese and specific information on the Brazilian participation in cooperation networks is available at <<http://portal.mj.gov.br/data/Pages/MJ86D74191ITEMIDE0D9B2528E1B47B6BE640EBE18386161PTBRIE.htm>>. Last visited: June, 16, 2010.

<sup>7</sup> IberRede official website is in Portuguese. It informs that IberRede members are: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela. Official Website: <<http://www.iberred.org/presentacion/>>. Last visited: June, 19, 2010.

points in each member country of the Ibero American Community of Nations intended to improve instruments of judicial assistance in criminal and civil matters and to strengthen cooperation ties in general among its member states. Its goal is to ensure effectiveness to judicial provisions from its members. IberRede contact points meet once a year to exchange information and experience in seminars that allow the development of cooperation in its fields of action.

Brazil is also part to the juridical and judicial international cooperation network created by CPLP.

The ‘Comunidade dos Países de Língua Portuguesa’ (CPLP), in Portuguese, or ‘Community of Portuguese Language Countries’, in English, is an international organization that gathers the Portuguese speaker countries to allow them to agree on common objectives to their international action<sup>8</sup>. In 2005, CPLP created a juridical and judicial international cooperation network (‘Rede Judiciária da CPLP’, in Portuguese; ‘CPLP Judicial Network’, in English) to deal specifically with criminal, civil and commercial matters.

The network foresees the installation of a database, fed by the contact points of each member state. It also intends to promote patterns for the requests made between member countries to judicial cooperation, as well as to create common lists that allow members and easier identification of responsible contact points in each state.

Since 2004, Brazil is also part to the network created by the Organization of American states (OAS) to exchange information for mutual assistance in criminal and extradition fields<sup>9</sup>.

According to the Brazilian government official website, the OAS Network is the most developed network in which the country takes part. The network developed a safe electronic mail (e-mail) mechanism that allows exchange of documents and sharing of work spaces. The whole mechanism is also fed by contact points of each member state.

(ii) *Judicial Cooperation in Arbitration*: Brazilian rules regarding arbitration are set in Law 9.307 of September, 23<sup>rd</sup>, 1996 (Law 9307/96)<sup>10</sup>. It establishes a few mechanisms to allow cooperation between state judges and arbitral tribunals.

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<sup>8</sup> CPLP is an international organization created in 1996, with its own legal personality and financial autonomy. CPLP aims to be a multilateral privileged forum to make mutual friendship and cooperation of Portuguese speaker countries stronger. It has eight members: Angola, Brazil, Cabo Verde, Guine-Bissau, Mozambique, Portugal, Saint Tome and Prince and East Timor. Official Website: <<http://www.cplp.org/id-115.aspx>>. Last visited: June, 17, 2010.

<sup>9</sup> Official Website: <<http://www.oas.org/juridico/MLA/en/index.html>>. Last visited: June, 19, 2010.

Even though the term ‘support judge’ is not expressly mentioned in the law, provisions set a very close role to the Brazilian judge when cooperating in an arbitral process. Once again the idea is to have a ‘support judge’, who is there to ensure assistance in the arbitration process when needed, so that it is efficient to the parties’ intention to use arbitration as their chosen dispute settlement mechanism.

Article 7, paragraph 4 of Law 9307/96 stipulates that the state judge is competent to appoint arbitrators when the appointment process fails:

Fourth Paragraph: If the arbitration clause fails to provide for the appointment of arbitrators, the Judge, after hearing the parties, shall rule thereon, being allowed to appoint a sole arbitrator to decide the dispute.

Under article 22, paragraphs 2 and 4, the state judge can also grant provisional measures when the arbitral tribunal is unable to do so or enforce provisional measures rendered by the arbitral tribunal:

Second Paragraph: If a party fails, without just cause, to comply with a request to render a personal deposition, the arbitrator or the Arbitral Tribunal shall give due consideration to such behaviour when making the award; and if a witness, under the same conditions, is absent, the arbitrator or the President of the Arbitral Tribunal may request the state Court to compel the appearance of the defaulting witness, upon evidence of the existence of an arbitration agreement. [...].

Fourth Paragraph: With the exception of the provisions of Paragraph 2, if coercive or injunctive orders become necessary, the arbitrators may request them from the state Court originally competent to decide the case.

(iii) *Court-to-Court cooperation*: Court-to-Court cooperation alludes to the possibility of having two judges establishing direct communication to decide a case that embeds transnational elements. As we have mentioned above, that possibility usually requires express statutory provisions.

In its definition, the official website of the Ministry of Justice states that ‘auxílio direto’ is ‘an instrument by which the totality of the facts is informed to a foreign judiciary so that it can render a decision’ and, still according to the information provided in the official website of the Ministry of Justice, ‘auxílio direto’ is one of the means by which the country exercises international juridical cooperation. The term, in Portuguese, alludes to direct cooperation, what could lead to a mistake, since its precise translation would be ‘direct assistance’. If one goes to the statutory provisions that allow

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<sup>10</sup> A complete version of the Brazilian Arbitration Law in English is available at <[http://www.amcham.com.br/servicos/arbitragem/lei\\_ing.pdf](http://www.amcham.com.br/servicos/arbitragem/lei_ing.pdf)>. Last visited: June, 11, 2010.



‘auxílio direto’ in Brazil, one will find that it refers to pure juridical assistance, as it always requires the participation of a central authority, usually the Ministry of Justice, or one of its departments, itself.

In order to prove our arguments, we present the definition of ‘auxílio direto’ provided by the Brazilian Superior Tribunal of Justice. In 2005, by means of the Sole Paragraph of Article 7 of ‘Resolução n. 9’<sup>11</sup>, the Superior Tribunal of Justice established that ‘for those international juridical cooperation requests that do not require an exam on the merits of the case, nor even a simple analysis of the proper formal proceeding, even if they are labeled as rogatory letter, they are to be sent or given back to the Ministry of Justice for the necessary measures to be taken’.

In the Brazilian Congress, an attempt to create a Law on International Judicial Cooperation in Criminal Matters<sup>12</sup> was beaten in 2007, because it was ‘contrary to the Brazilian Constitution’<sup>13</sup>. It intended to celebrate ‘auxílio direto’ on criminal processes, but it also considered ‘auxílio direto’ to be performed by a central authority<sup>14</sup>.

It is quite important to keep in mind the differences between assistance and cooperation that were discussed above, once Brazil established mechanisms that use the term ‘auxílio direto’, in Portuguese (‘direct assistance’, in English) and that might seem to have tried to celebrate ‘direct cooperation’. But, in reality, those instruments celebrate the usage of the very same long-known mechanisms of judicial assistance, through central authorities, which does not represent any kind of innovation in the legal cooperation field.

## (b) Common Law Examples

### i) Networks

The main idea for the creation of networks, either networks of authorities and networks of judges, is to overcome ignorance and isolation of judges and authorities when they are to deal with a transnational issue (KESSEDJIAN, 2005)

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<sup>11</sup> Available at: <<http://www.stj.jus.br/SCON/legislacao/doc.jsp?livre=compet%EAnCIA+acrescida&numero=%229%22&norma=%27RES%27&&b=LEGI&p=true&t=&l=20&i=1>>. Last visited: 10, June, 2010.

<sup>12</sup> Available at: <<http://www.camara.gov.br/sileg/integras/163854.pdf>>

<sup>13</sup> The terms are used in the summary of the final evaluation rendered by the Commission of Constitution, Justice and Citizenship, responsible for analyzing law projects and express an opinion on whether they should become law or not. Available at <[http://www.camara.gov.br/internet/sileg/Prop\\_Detalhe.asp?id=133333](http://www.camara.gov.br/internet/sileg/Prop_Detalhe.asp?id=133333)>.

<sup>14</sup> As indicated by article 3, *in verbis*: “Art. 3º - Os pedidos de assistência judiciária internacional serão encaminhados ao Ministério da Justiça, diretamente ou por via diplomática, que poderá atender desde logo as solicitações que, segundo a legislação brasileira, não necessitem de autorização judicial”.

It is sought to allow decisions to be taken in a more consensual basis than they it would be taken if there was a competition between authorities and judges in place. Competition usually takes place when judges or authorities from the different legal systems involved in a certain case with transnational elements try to affirm their competence in an exclusive manner. The ultimate goal of creating a network to foster cooperation in the legal area is to be able to establish what best practices are. When in a network, there is no need of seeking top-down harmonization of law and policies around the world, but only the exchange of experience and cooperation.

(i) *network of authorities*: networks of government authorities are not new, once they exist at least since 1996. In reality, the idea of recommending that

relevant authorities (e.g. court presidents or other officials, as appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other Contracting states (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2006, p. 5)

was first first proposed in the 1998 Seminar for Judges on the international protection of children, in respect, at least initially, to issues relevant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

The Hague Conference on Private International Law has been, therefore, a leader in requesting the formation of networks of authorities in its convention, through the creation of ‘Central Authorities’, ever since 1998.

Central Authorities are understood as being facilitating bodies, within a state, that are able to be in connection with the Central Authorities of other states which are party to the same convention. It is important to mention that networks of authorities vary greatly in form. They may be formed within the framework of a certain international organization, or they may as well be formal, but independent from any international organization.

(ii) *network of judges*: networks of judges are seen as highly interesting due to the fact that they might profit from a smaller degree of formality, which allows more effective contribution. (KESSEDJIAN, 2005). Those networks serve as actual ‘think tanks’ for members to be up-to-date with

the most current trends in the specific legal fields, improving performance in their professional activities. Amongst the existing mechanisms established by judges' networks to achieve their purposes are gatherings for seminars and the creation of newsletters aimed to keep the communication channel active.

## ii) Judicial Cooperation in Arbitration

Even though it might be argued that there is competition between state Courts and arbitral tribunals<sup>15</sup>, the whole debate seems to overlook the idea that arbitration and state courts are complementary and, therefore, should work together. Hence, cooperative alternatives are rising, establishing possible cooperation of judges in arbitral processes, by means of the figure of '*juge d'appui*' or '*support judge*', in the general accepted translation to English.

The support judge is there to ensure assistance in the arbitration process when needed, so that it is efficient to the parties' intention to use arbitration as their chosen dispute settlement mechanism.

On those grounds, the support judge would provide the arbitral tribunal in many different ways. The judge can be responsible for appointing an arbitrator when the appointment process in the arbitration fails, or prolonging the deadline to render an award. The support judge can also grant provisional measures when the arbitral tribunal is unable to do so and enforce provisional measures rendered by the arbitral tribunal.

## iii) Court to Court Cooperation

Court-to-Court Cooperation refers to the possibility of having direct communication between judges in different state courts when they are dealing with cases that have transnational elements. It is necessary to deal with the jurisdiction issues involved in the establishment of direct communication between state judges since states understand jurisdiction as part of their exercise of sovereignty and,

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<sup>15</sup> See **Case Van Uden**, C-391/95, 17 Nov 1998. **Judgment of the Court of 17 November 1998. - Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Brussels Convention - Arbitration clause - Interim payment - Meaning of 'provisional measures'. - Case C-391/95.** Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0391:EN:HTML>>. Last visited: May, 5, 2010.

therefore, states might feel that exercise could be diminished or limited by those kinds of communication.

(1) *Jurisdiction*: Conventions on jurisdiction are never easy to negotiate. The Hague Conference on Private International Law itself has been unable to make its members agree on a convention on jurisdiction and foreign judgements on civil and commercial international relations, since 1922.

Hague Convention on Choice of Court managed to be negotiated but has never come into force due to the strong restriction member states show regarding Convention's provisions on direct jurisdiction.

Problems with unfairly objective allocation of jurisdiction around the world are among the main concerns states have when dealing with a general agreement on jurisdiction allocation. As mentioned, jurisdiction remains, in some countries, an exercise of sovereignty, to which no limits are acceptable unless their breach is very well paid.

(2) *Provisional Measures*: In the specific area of the granting of provisional measures, one observes a very diminished of states to cooperate. KESSEDJIAN (2005) attributes that to the fact that a case will be very often lost or won on the issue of whether a provisional measure is granted and enforced in favor of one party, because the losing party in the provisional phase would have a strong incentive not to pursue the matter.

(3) *Taking of Evidence*: It is the field of the evidence taking that one finds the oldest examples of traditional judicial assistance, due to the very nature of the topic. Evidence is usually gathered in a way known in the home country while the requested country may impose its public policy if those procedures are incompatible with its own. So, there is space for the exercise of national court rules even where international assistance took place.

Hague Evidence Convention limits itself to the taking of evidence outside the home judicial system, in a procedure that involves a Central Authority, while proceeding is taking place in the home jurisdiction. Even the most willing behaviors on assisting foreign and international courts on the issue end up not taking into consideration the needs and means of the foreign court itself, as they work somewhat unilaterally.

A good example of the disregard of the foreign court needs and means is the United States Supreme Court understanding of section 1782 of the United States Code. In the Intel decision, the American Supreme Court understood that parties to the proceedings outside the United States could seek judicial cooperation from the United States whether or not the evidence was actually requested by ‘any interested person’ or the proceedings were still pending or, still, the evidence is likely to be used in a proceeding yet to be instituted.

On these basis, counter effects may be envisaged since decision encourages parties to foreign proceedings aiming to harass the other party to go on with foreign proceedings too.

(4) *Bankruptcy*: Even though bankruptcy has always been a theme considered to be an area where public policy is important, it has managed to observe the best efforts to put into place a direct form of court-to-court cooperation. In 2003, the American Law Institute published its principles of Cooperation among the NAFTA Countries, along with a set of *Guidelines applicable to Court-to Court communications in Cross-Border Cases*. Successfully, by early 2004, guidelines were already endorsed by a number of judges all around the world.

### **3 Critical Remarks on Cooperation among Courts**

Although Cooperation among Courts is a model conceived to deal with cross-border dispute resolution problem arisen from this complex and globalized world, directed to solve and to overcome the limits imposed by the exhausted sovereignty paradigm, it seems that this model is still insufficient to operate according to the logic of an International Law inserted in a Post-Modern Crisis of deconstruction (BITTAR, 2004, 2005; CASELLA, 2006, 2007a, 2007b, 2008, 2009a, 2009b; KJAER, 2009; LADEUR, 2009; VIELLECHNER, 2009). As a transitional instrument for Post-Modernity, it represents only the half of the way, as it still lacks the abandonment of, at least, two specific aspects of the Modern paradigm: (i) state-based Law; and (ii) standardization of cultural issues.

It should be stressed that, despite the fact that this topic is specifically addressed to develop a critical approach to Cooperation among Courts paradigm, (i) these critics are also applicable for Competition paradigm, although some punctual aspects might be modified in order to be compatible with this other paradigm; and (ii) the critical remarks developed inside this topic are not intended to

propose a new ‘third’ model for solving cross-border dispute resolution problems, at least for the moment.

The second statement above might cause some strangeness, as every critical project has two main moments: (i) *negative*: when the critical approach seeks to refuse the whole basis of the standing theory; (ii) *affirmative*: when the critics propose the outlines of a new theoretical conception for what has been the main object of studies. But the critics which are developed in this paper will not be able, by themselves, to propose a completely structured mechanism to deal with cross-border dispute resolution problems. One should note, maybe, that a vain search for certainty of solutions is not an adequate expectation to a Post-Modern ambience (BAUMAN, 1998; BITTAR, 2004, 2005; CASELLA, 2006, 2007b).

Be that as it may, the absence of a structured proposal in this paper is otherwise methodologically based. While dealing with a hard case, or else, a borderline case, it seeks its critical foundation on negative dialectics (ADORNO, 2009). Differently from hegelian affirmative model, conceived for traditional matters, and in which the biphasic critical model mentioned above is based, negative dialectics is freed from an affirmative nature, although it does not lose its determination capacity (ADORNO, 2009, p. 7). Its emphasis is on the simply refusal of present conditions, as this single criticism allows to unravel borderline matters of these hard cases. And a sole subject cannot, by itself, have a constitutive property by its own thought (ADORNO, 2009, p. 8): when dealing with borderline cases, it must not be forgotten L. WITTGENSTEN’s axiom (1994, p. 245):

5.6 *The limits of my language* mean the limits of my world. ....

5.62 .... The world is *my* world: this is manifest in the fact that the limits of *language* (the language which only I understand) signify *my* world’s limits.

5.621 The world and the life are one.

5.63 I am my world. (The microcosm). ....

7 What we cannot speak about we must pass over in silence. (emphasis added).

It is not an easy matter to deal theoretically with borderline cases. They demand a specific handling, as traditional concepts and thoughts of the present world are insufficient to provide the suitable intellectual instruments in order to propose a new paradigm. Actually, there is no sufficient language available to be the basis of new and innovative propositions about borderline cases, such as cross-border dispute resolution problems raised from the insertion of International Law in Post-Modern Crisis.

Post-Modernism, while questioning International Law's foundations, and while pointing to Cooperation among Courts paradigm's limits, unfold a whole new world of possibilities whereof present language and thought is inappropriate to deal with. In order not to speak wrongly about the new possible, sending it to the impossible due to a failure language description, the best position assumed is to remain silent on the new world, and to persist on the critics about those specific residual Modern limits: (i) state-based Law; and (ii) standardization of cultural issues. Everyday practice and the epistemic community will be the proper source of this new language.

### *3.1 A New Legal System Model (Global Governance)*

The expansion and the deepening of Economic Globalization has led to the emergence Global Governance Juridical Regimes, in which it is supposed the prevalence of International Law over Domestic Law due to a systemic reason of thematic and sectorial technical-functional specialization, triggering the fragmentation phenomenon (FISCHER-LESCANO; TEUBNER, 2004; KUNTZ, 2003).

This consists in a new conception of legal system model (global juridical regime) derived from the fact the insertion of International Law in a Post-Modern condition (LADEUR, 2009, p. 1357), and it has its main foundations on typically liberal ideals, justifying, for example, in the nineties, the neoliberal dream of the extinction of state due to the haste by which Economic Globalization was undergoing (HABERMAS, 2006b, p. 175), the so-called Global or Transnational Law without state (TEUBNER, 2006).

The fragmentation of International Law in thematically and sectorally specialized Global Juridical Regimes is related to society's complexification, in which a Global Law thematically specialized pictures the systemic-functional differentiation of global society in distinct sub-systems, each one constructed by different rationalities, logics, legalities, legitimacies and languages (economical, political, social, commercial, juridical....) more or less institutionalized (FISCHER-LESCANO; TEUBNER, 2004, p. 1004). Picturing global society's systemic complexity, Global Law absorbs a more systemic complexity, formally and substantially, as the latter must follow the formal and the substantial differentiation of the former in order to keep itself up to date and capable of solving conflicts.

In fact, due to this intense fragmentation, there is an increasing complexification of the society, leading to an increase of uncertainty and of risks, demanding more complex and specialized juridical regulatory regimes aimed to order each particular theme or sector of social life: health, commerce,

antitrust and other free market issues, foreign investments, financial system, development, intellectual property, economic crimes, ... This global regulation in specialized 'micro-structures' is framed by flexible juridical norms – not necessarily state-based ones –, each system holding a specific social rationality of this systemically differentiated society (KJAER, 2009, p. 484-5).

This new legal system model presupposes a new social organization pattern which has arose with this globalized world (KJAER, 2009, p. 483 e 485), namely, one in which heterarchical relationships are developed in a network disposition (VIELLECHNER, 2009, p. 517-8). According to this conception, Law must be understood as incorporating this heterarchical and relational fragmentation logic inherent to Globalization (VIELLECHNER, 2009, p. 527), what leads to a fundamental transformation of traditional organizational structure and to a splintering of all typical Modern conceptions such as hierarchy, distinction between public and private environment (KJAER, 2009, p. 483), and that there is only one sole centre which holds the decision-making power with nomogenetic capacity (the ability to create juridical norms) – the state – (FARIA, 2004, p. 53-5).

Global Juridical Regime has a specific order, which pictures this new world disorder, whereby it must be comprehended as a great (global) juridical network of all the networks (network of networks) of legal national, transnational, international, intergovernmental and supranational regulation originated from non-state (private and public, but non-state) and state actors, which must be coordinated harmonically (VIELLECHNER, 2009, p. 528) by a criterion of systemical-functional differentiation into specialized sectorial lines (FISCHER-LESCANO; TEUBNER, 2004) in which the source of order is acentrically generated through a relational rationality of global juridical networks of thematic regulation (VIELLECHNER, 2009, p. 518).

In other words, Globalization modifies the legal system model, because it accompanies superior societal self-organization processes aiming to construct non-state, deterritorialized, thematic, acentric and self-organized networks of juridical regulation (VIELLECHNER, 2009, p. 524-5), framed by heterarchical and polycentric legal structures (FARIA, 2004, 2008; KJAER, 2009, p. 488). This new legal system model perceives a global international society, networkly articulated, without vertices or single centers of Power, as it is heterarchical and acentric. In this global and complex society, juridical regulation and dispute resolution is not oriented by territorial sovereignty criteria, but rather by systemical-functional criteria, thematically and sectorially specialized in social functions (LADEUR, 2009, p. 1358-9, 1362 and 1365).



It must be stressed that this new legal system is based on a systemic comprehension of society, and that it presupposes the idea that each system has its own rationality, logic, legality, legitimacy and language (economical, political, social, commercial, juridical....) more or less institutionalized. Each social system is self-sufficient, and has its own dispute resolution mechanisms, more or less institutionalized.

In this globalized world, transterritorial juridical regulation is not anymore a state-based Law, but, rather, a non-state one. Its sources are enterprises, coordination mechanisms of variable geometry, non-governmental organizations, thematically and sectorally specialized: commerce (WTO), financial system and international investments (World Bank Group, Basel Committee), health (WHO), informal mechanisms of coordination between countries, such as G-7, G-20, ...

In other words, state-law and its dispute resolution system are not needed anymore. Actually, they are not regarded as efficient or as binding for these new cross-border controversies, as these thematically and sectorally specialized systems are more capable to solve them sooner and better, or else, in other words, its mechanism are more efficiently and more qualified to solve them in a more satisfactory solution, either through a more institutionalized dispute resolution system (arbitration, mediation, conciliation, Panels), or by an immediate social control system (automatic self-regulation capacity).

In this new legal system paradigm, the clash between Competition and Cooperation among Courts models, and its debate, does not make any sense, since state Courts lose their importance in this global society where not even fully institutionalized mechanisms are more desirable to solve cross-border controversies – due to their specialized knowledge – than state-based Law and dispute resolution system. If there are no sovereign organs in dispute of Jurisdiction – because there are neither exclusively national legal systems, nor nationally based Courts –, there is no need of developing and framing a system to synchronize harmonically them by Competition or Cooperation among Courts paradigms.

### *3.2 Cultural Issues*

As mentioned above, Cooperation among Courts pretends to show itself as a mere juridical and scientific technique of letting judges of different national Courts to discuss over a cross-border dispute matter and to solve it. But, when it is analyzed according to cultural perspective, it is possible to perceive that, inside this model's discourse, there is a mixture of Power and validity (HABERMAS, 2002, p. 166, 2004a), or, in other words, that there is an union between a scientific aim of unconditional

(and universal) validity due to its apparently neutral, objective, scientific-positive feature, with an internal disposition of accomplishing and of perpetuating a relationship of dominance – or else, a relationship of Power (HONNETH, 1996, p. 508-9).

As Friedrich Nietzsche (2006, p. 183) pointed, ‘power, and not knowledge, is practiced through science’, as it is a technical-rational formula ideologically founded. Cooperation among Courts can be regarded by a model of solving cross-border controversies which pretends an unconditional validity character just as scientific conclusions, whose truth value of true does admits no questioning, juridical norms and artwork (HABERMAS, 1992, 2002, p. 162, 2004a, p. 65-6), all of them imbued with dominance logic.

Although Cooperation among Courts paradigm is presented as a mere technique which preserves diversity, it cannot be forgotten that Technique and Science are ideology (HABERMAS, 2006a). It somehow preserves a typically Modern logic of constructing unity and identity by excluding or assimilating the Other (BAUMAN, 1998, p. 13-9 and 37) similar to Projects of constructing the non-natural political organization of societies of a homogeneous nation-state. For the purpose constructing a pure and certain political and juridical order, alternative identities must be eliminated by the appreciation of cultural assets of one society in detriment of the ones of others, in order to privilege one group’s culture and to strengthen the centralized Power (of the political organization of society – for instance, the state -) due to cultural unification (KYMLICKA, 2007, p. 61-4).

In this sense, Cooperation among Courts cannot be regarded simply and fondly as a mere juridical and scientific technique constructed after a scientific clash with other paradigms, as it is not the product of a scientific revolution caused by disputes between theoretical models aiming a more refined scientific rationality. Actually, it consists precisely in a technique constructed to preserve, to promote and to perpetuate a relationship of dominance of one specific juridical, economical and cultural tradition over other ones, namely, the specific Western and Capitalist worldview, due to its global predominance in this complex world in which International Law is inserted in a Post-Modern condition. The other local juridical, economical and cultural traditions are unable to develop proper theoretical endurance instruments strong enough to refuse this unconditional and unmodified implant of an external cultural asset (FARIA, 2008, p. 80-6).

Cooperation among Courts cannot be taught, learned and practiced uncritically, as it represents an instrument of symbolic violence of juridical, economical and cultural traditions due to its function of dominance mechanism of local traditions by another, globalized, through juridical symbols (FARIA,

1988) which ravish local cultural worldviews without the complete conscience and consent of them. Law, in fact, is fight arena in which different forms of life shock with themselves for the possible prevalence of their as the better (UNGER, 1983, p. 18): here, Cooperation seems to be a punctual expression of a larger clash of civilizations and of their cultural assets.

A singularity seeks a totality position (LUKACS, 2001, p. 144-5) through a scientific and technical discourse submitted to systemic imperatives of prevalence of a sole worldview with civilizing ambitions (HONNETH, 1996, p. 520 e 522-3; KOSKENNIEMI, 2002) imbued with a colonizer ethos (BAUMAN, 1998, p. 7-11), a typical logic of the movement of (i) the rise and the expansion of Capitalism in History; (EDELMAN, 1976, p. 91-122; NAVES, 2000; PASUKANIS, s.d., p. 81-107) and (ii) of the prevalence of Western society's cultural assets. These two mains aspects of Cooperation among Courts paradigm's ethnocentric feature will be briefly examined below.

### 3.2.1 Civil Law versus Common Law: An Oriented Hybridization of Legal Regimes

It must be remembered that if Cooperation among Courts paradigm is the preferred one to guide the construction of new baselines for solving cross-border controversies, there is not only one way to build it. It must be chosen one of the two main models of framing Cooperation, namely, Civil Law and Common Law. It was noted that the latter is regarded as the best because its principiological orientation is flexible enough to allow spontaneous and functionally cooperation acts between judges from different countries without the need to resort to a non-judicial organ of each state as an intermediary.

Globalization, by promoting the increase in the process of social 'functional differentiation of economic and social systems in a never seen before rhythm' (FARIA, 2004, p. 8), also meant the 'propagation of social technologies based solely on criteria and values such as efficiency, competition and accumulation, removing from Capital, production and wok universes any humanly meaningful sense of direction.' (FARIA, 2004, p. 8-9).

There is a global dissemination of local social control mechanisms aiming their global universalization according to ambitions of cultural traditions of the core countries of the Globalized Economy. It is a truly importation of juridical institutes and models originated from distinct cultural traditions (FARIA, 2008, p. 80-6) directed to modify, in accordance with the exigencies of a globalized world, local cultural conceptions. More explicitly, there is a larger process of dollarization of legal knowledge: 'with the English and American rise and hegemony in the global economic financial

system’, there is an ‘expansion of Anglo-Saxon legal culture and patterns ... in detriment of roman-Germanic legal culture and patterns’ (FARIA, 2008, p. 80-1).

It is in this specific sense that the preference of common law model of framing Cooperation among Courts must be understood: it is a punctual expression of this larger quest of hegemony which is being held by these two main legal models. Civil law and common law keep their mutual attempts and assaults of prevailing historically over another.

But it is only half of the story. Economic systemic imperatives, and not truly exigencies of legal thought or theory, are the basis for the preferable aura around common law Cooperation among Courts pattern. It is the result of several researches, just like Spigelman’s (2008), based on L&E premises, in which it is proved that common law must prevail globally over any civil law legal framing model due to its capacity of producing decisions and juridical institutes economically more efficient and certain (ANDERLINI; FELLI; RIBONI, 2008; ARIDA, 2005, p. 16; BARZEL, 2000; POSNER, 1990, p. 357-8; TRUBEK, 2007).

In other words, common law must prevail as the model of framing legal thought, institutes and systems in a globalized world order only because it is source of better solutions for social disputes – including, of course, cross-border controversies –, or, because it is source of more efficient solutions, producers of social welfare maximization (KAPLOW; SHAVELL, 1999; SALAMA, 2008, p. 37). In other words, common law has to prevail over any other model of framing juridical thought and practice because it is the more adequate for the maintenance and for the reproduction of the economic mode of production and exploitation known as Capitalism.

In fact, systemic imperatives demanded the introduction of the efficient variant inside the conception of legal phenomenon (FISS, 1986, p. 3-4 e 9-10). This conclusion unravels the underlying political and economical discourses which structures the juridical one, and that were eclipsed by naïve and formal arguments, in order to deepen their comprehension. After all, a Capitalist economic mode of production and exploitation is not the only dimension of reality possible. And to maintain this naïve conception is to keep a one-dimensional perception of possibilities of reality from which global social, juridical, political and economical relations can be constructed (UNGER, 1983, p. 2-3).

The efficiency as a legitimacy criterion of a legal framing was conceived from the acceptance of the fact that the legal system had to mirror market structure, in order to frame economically and politically society in accordance with individual and liberal premises: ‘[T]he abstract market idea is identified with a specific version of the market – the one that has prevailed in most of the modern

history of most Western countries – with all its surrounding social assumptions, real or imagined.’ (UNGER, 1983, p. 12).

It is pertinent to remember that the abstract idea of market as a system composed by economic agents who negotiate freely one with the other derives from a specific manner to perceive the economic phenomenon. Actually, it accrues from a very restricted worldview, which arose inside the juridical and economical model developed in a historically and territorially limited portion of the World: the West, or, more precisely, the Western part of Europe, during its Modernization process, which generated is the Capitalist Economic model.

This mercantile capitalism, constructed according to a particular culture tradition, conception has an essential liberal feature (*laissez-faire*), and is not a universal society model, as it is not a natural form of political and economical organization of society: it is, in fact, a prototype designed by legal, economical and political theorists of the nineteenth century (KENNEDY, 1998, p. 467-8; POSNER, 1990, p. 359, 2003, p. 12; TRUBEK, 2007; UNGER, 1983, p. 5-7 and 14; WEBER, 2001, p. 236-8 and 285-95):

Successive failures to find the universal legal language of the democracy and the market suggest that no such language exists. An increasing part of doctrinal analysis and legal theory has been devoted to containing the subversive implications of this discovery. (UNGER, 1983, p. 6).

Cooperation among Courts paradigm framed according to a common law model embodies the political, economical, juridical and philosophical discourse of free market, with (neo)liberal character, as it is preferred because, in the absence of explicit regulation, voluntary transactions are facilitated in their most efficient form, disregarding distributive matters (ARIDA, 2005, p. 12-3; EDLIN, 2000, p. 408; KENNEDY, 1998, p. 465-6; SPIGELMAN, 2008). This is a true normative character assumed by this perspective, founded in economic and political liberalism ideology, as dogmatic as it is proselytizing, which aims to guide the development of worldwide and global transformations of local and global legal systems (BINDER, 1996, p. 280; UNGER, 1983, p. 6 e 12) in accordance with the demands – literally – of a Liberal and Conservative Capitalist Economy (KENNEDY, 1998, p. 468 and 473).

If Law is understood as politics (FISS, 1986, p. 2), or as an arena of struggle of interests (UNGER, s.d., p. 10), it is possible to note and to reveal the eclipsed dimension of the discourse about Cooperation among Courts framed according to a common law model, justified in terms of efficiency.

This paradigm is not as neutral, apolitical and scientific as it could have been regarded. It is, actually, a non-declared instrument of the liberal rhetoric which manipulates the apparently neutral value of this ‘technique’ in function of efficiency, although this liberal feature might have not been calculated or intended by its creators.

The naive, unconditional and uncritical acceptance of this globalized model, which was locally originated, by a different local cultural tradition, means the inconsequent transplant of a Western, European, Modern and Anglo-Saxon worldview, based on an economical liberal conception of organization of society, historically and culturally restricted. These underlying premises of Cooperation among Courts paradigm were conveyed and catalyzed by Globalization, in spite of its self-styled, pretended, professed and so-called instrumental and technical character. But this model of society is not the sole possible, as alternative social orders can and must be thought: ‘Free people, remember this maxim: you can conquer your freedom; never, however, recover it’ (ROUSSEAU, 2006, p. 55).

The universalization of this model aims to modify traditional cultural assets – juridical institutes and institutions – by foreign ones, in the name of a global affirmation of a legal-economical rationality originated in Western, European, Modern and Anglo-Saxon culture, of (neo)liberal feature (dollarization of juridical knowledge) (FARIA, 2008), perpetuating the colonial status – or even, the colonial pact – assigned to cultural traditions of the periphery of the Globalized world, even after their political independence.

### 3.2.2 Civilization versus Non-Civilization: An Uniform Diversity

Cooperation among Courts paradigm, from another cultural perspective, can also be regarded as an inappropriate and precipitated universalization of Western culture, as it is based on a presupposed assumption which is typical of Western society: the paradigm of consent.

In fact, the single premise that different countries, through their national legal systems Courts, desire, indeed, to agree upon terms of a solution of cross-border disputes is culturally oriented (ethnocentrically conducted). Its benchmark can be pointed as being, for instance, the habermasian universalization principle, which is nothing more than the application of the Kantian categorical imperative ‘those who participate in a discourse cannot reach an agreement that meets everyone's interests, unless all do the exercise to adopt the views of each other’ (HABERMAS, 2004a, p. 10).

Consent cannot be seen as a universally accepted value: what if a singular people – not even nation or state – does not want to achieve, or even try, consent? What if a country does not want to cooperate with another? An unconditional affirmative position about Cooperation among Courts paradigm can be understood as a mechanism directed to force people to be free (despotism of liberty). In other words, its orientation is to force people to be uniformly diverse. It consists, precisely, in the despotism of a single conception of diversity, namely, the only one accepted by Western world tradition: consent must necessarily be reached, in order to allow a pacific situation of living together. Due to this necessity, a whole procedure has to be constructed in order to achieve this consent.

Western philosophical thought, endowed with the capacity for self-criticism (HABERMAS, 1993, p. 94), must be able to surmount the limits of its rationality, which characterizes its singular worldview spatially and temporally determined (Modern European Western) (HABERMAS, 2002), in order to open itself to other rationalities – or, even, to other forms of rationality, including irrationality -. This exercise of ethical-political self-understanding by Western world allows it to perceive the inevitability of contexts intersubjectively shared, in order to construct and to reach its own project (HABERMAS, 2004b, p. 5). Only through this kind of comprehension it will be possible the self-recognition of the limited perspective of its pretended Universalist worldview.

The Modern European Western world's limits will only be noted and overcome if the limits of the other world are properly and completely included and comprehended in their cultural and historical perspective: the axiological orientation of consent is not, maybe, the best, as it may not make concrete sense for people developed structurally in accordance with other cultural and social dynamics. Cross-border controversies resolution framed through a Cooperation among Courts perspective is not necessary or natural, and might be understood as a renewed expression of Western colonialist and civilizing pretension in twentieth century disguised by a mechanism justified as a mere technique directed to overcome sovereignty limits.

Cross-border controversies and the discussion of the mechanisms to deal with the problems which arise within them in a Globalized world are interesting, and the Post-Modern Crisis is a condition which introduces new variants to legal thought. Different cultural, juridical, economical and social traditions must share the same context. But it does not mean that this intense approach of countries has to be developed in a cooperative way, in accordance only with Modern European Western world's demands as a new unilateral colonial statute and pact with new global trading posts. The conscience of

this single condition signals to an interesting and larger structural change process that International Law is undergoing due to its insertion in Post-Modern Crisis.

#### **4 Conclusion**

The ordinary solution to an equal possibility of submitting a case to be settled by different national Courts, such as to resort to jurisdiction, exclusive jurisdiction, choice of court, *lis pendens*, *forum non conveniens*, among others are not effective to resolve non-commonplace issues in Private International Law, seeming insufficient to deal with problems raised with present consolidating globalization.

This insufficiency diagnosed can be inserted in a specific comprehension of a paradigmatic exhaustion of Jurisdiction, related to sovereignty. International litigation, in order to operate synchronically with the complexities inserted by this globalized world, has developed new conceptions of manners whereby this notion of Jurisdiction could be improved, aiming to a foreseeable and certain procedure to solve cross-border disputes.

These models are Competition and Cooperation among Courts. While the former advocates the idea that a free market of judicial services between Courts of different countries would enhance, improve and hasten the solution of cross-border disputes, the latter pretends to be simply a technique whereby Courts of different countries can work together.

First of all, recent literature regarding Competition and Cooperation among Courts paradigm were examined, in order to understand the precise terms of the discussion implied in each of them. It was possible to stress the reasons which motivate why Cooperation is seen as the preferred one to guide the construction of a new baseline to Jurisdiction in cross-border controversies, although it must not be regarded as immune to criticism.

These critical remarks on Cooperation paradigm were the object of the second part. Although Cooperation among Courts is a model conceived to deal with cross-border dispute resolution problems arisen from this complex and globalized world, this model is still insufficient to operate according to the logic of an International Law inserted in a Post-Modern Crisis of deconstruction, as it still lacks the abandonment of, at least, two specific aspects of the Modern paradigm, namely, (i) state-based Law; and (ii) standardization of cultural issues.



It is expected that the authors could have achieved their final purpose, which is to try to outline possible original contributions to contemporary international legal thought on the development of improved mechanisms to deal with cross-border disputes arisen in a Post-Modern, complex and globalized world disorder.

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